
**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of)	CC Docket No. 96-98
1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	

COMMENTS OF ESCHELON TELECOM, INC.

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COMMENTS OF ESCHELON TELECOM, INC.

Eschelon Telecom, Inc. (Eschelon) submits these comments in response to the Federal Communication Commission's (Commission or FCC) Notice of Proposed Rulemaking (NPRM) in the above-captioned matter. This NPRM initiates the Commission's first triennial review of unbundled network element policies. Under Section 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 (the Act), Incumbent Local Exchange Carriers (ILECs) must provide Competitive Local Exchange Carriers (CLECs) with unbundled network elements (UNEs) to enable CLECs to provide local service. In this proceeding the Commission will review the status of UNEs and determine if any UNEs should be reconsidered, modified, expanded or eliminated.

INTRODUCTION TO ESCHELON

Eschelon provides integrated voice, data, and Internet services over approximately 125,000 access lines to more than 32,000 small businesses located in urban and suburban areas. On average, each Eschelon customer is served by about four access lines. Over a third of Eschelon's customers take service at multiple physical locations. Eschelon's customer base is geographically dispersed.

Eschelon serves a market segment that is relatively underserved by ILECs. Small businesses typically have more complex telecommunications needs than residential consumers but unlike bigger businesses, Eschelon's small business customers generally do not have a telecommunications expert on staff. To better meet its customers' needs, Eschelon also distributes and installs business telephone systems.

Eschelon employs over 900 telecommunications/Internet professionals and operates in twelve markets in seven states: Arizona, Colorado, Minnesota, Oregon, Nevada, Utah, and

Washington. In 2001, Eschelon had approximately \$100 million in revenues. Eschelon has raised \$126 million in equity and \$151 million in debt and has invested over \$115 million in telecommunications facilities. It owns and operates six voice and seven data switches and has over 100 collocations. Eschelon provides network services to its customers in three ways: first, Eschelon leases UNE-loops from Qwest in six of its states, and from Verizon in one state, connects the loops to our collocated equipment, and then leases ILEC transport to an Eschelon switch; second, Eschelon purchases a UNE platform product, UNE-E,¹ from Qwest; and third, Eschelon resells Nevada Bell services. Eschelon UNE purchases from ILECs include loops; local switching; UNE combinations; interoffice transport; enhanced, extended loops (“EELS”); local interconnection service (“LIS”) trunks; and tandem switching.

SUMMARY

Congress was clear when it passed the Telecommunications Act of 1996 that competitors are to have three methods for entering the local telecommunications market: the competitor may build its own network to which the ILEC is required to permit interconnection at cost-based rates; the competitor may use the ILEC’s unbundled network elements which are to provided at cost-based rates; and the competitor may resell ILEC services which it obtains at a discount reflecting the ILEC’s avoided costs. 47 U.S.C. 251(c). Competitors are free to use any and all entry methods to compete with the ILEC. Indeed, this Commission has recognized that all three

¹ “UNE-E” is Eschelon’s term for customers served under an interconnection agreement amendment with Qwest that provides a platform product bundled with 1050 minutes of local usage and a feature set. UNE-E may be regarded as a variant of UNE-P, a combination of network elements consisting of the loop and the switch port, including switch port features.

methods of entry are necessary to enable competitors to “serve different types of customers in different geographic areas.”²

In some discussions, the term “entry” is used in a manner that suggests that once a competitor has “entered” a market, the competitor should no longer require the means that permitted its entry. This connotation is unfortunate. “Entry” is defined as “the right, means or opportunity to enter a place or to be a member of something.”³ The right to compete will be hollow if the means to compete are whittled away. While building facilities is an important means for competitors to utilize, purchasing UNEs are also legitimate and permanent methods of competition according to the directive of Congress. The Act does not suggest that UNEs and resale are merely transitional mechanisms that will wither away as CLECs complete the task of duplicating the ILEC’s network. The Act seeks to avoid socially wasteful investment in pointless facilities duplication and the ILECs’ duty to unbundle network elements is a central means for securing the right of a competitor to enter the local market.

Wall Street has little interest in providing more equity or debt for CLECs to fund additional investment in telecommunications facilities. The extensive string of bankruptcies occurring among the companies born after the Telecom Act has cast a pall over the telecom industry and external sources of funding have dried up. Like a number of other CLECs, Eschelon has grown rapidly since its inception, but is not yet cash-flow positive and cannot fund additional, unplanned facilities investment⁴ internally.

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Fcd 3696, 3766, ¶ 5 (1999) (*UNE Remand Order*).

³ *New Oxford American Dictionary*, (Oxford University Press, 2001).

⁴ Although Eschelon is not currently in a position to fund facilities investment to replace UNEs, Eschelon is nonetheless investing significant sums in telecommunications plant and other assets everyday, in addition to the millions of dollars Eschelon has invested in its voice and data switches as well as its collocations. These current

The Commission should understand that removing or restricting the availability of any UNE to Eschelon would not cause the Company to make additional investments in facilities to replace UNEs. Instead, Eschelon would attempt to respond by radically scaling back its business plan and reallocating its existing resources to the extent possible. Eliminating loop and transport UNEs would put Eschelon out of business over night. Although the Commission may as a policy matter, prefer that companies like Eschelon make investments to reduce their dependence upon UNEs, as a practical matter, the Commission can neither re-open the capital markets to CLECs nor transform Eschelon immediately into a profit-generating machine capable of funding facility investment internally. A decision by the Commission to delist or geographically restrict certain UNEs will not promote investment in facilities by CLECs like Eschelon. Although such decisions could in theory direct Eschelon towards alternative UNE suppliers, in fact such alternative suppliers do not exist and the economics of telecommunications infrastructure makes it very unlikely that alternative suppliers will emerge any time soon. Without access to UNEs, Eschelon's entire investment in telecommunications facilities could be, for all practical purposes, useless and worthless.

In the markets in which Eschelon operates, the ILECs are, for the most part, the single supplier of necessary network elements. Where an alternative supplier of a network element exists, it is not commercially or technically feasible for Eschelon to rely exclusively on that supplier instead of the ILEC. Eschelon's provisioning of telecommunications services to its customers would cease if the ILECs in its markets were to be freed of their unbundling obligations.

investments include spending on customer acquisition, the purchase and installation of the line cards needed to serve a customer on our switching facilities, UNE loop installation costs, and upgrades to our back office systems.

At a minimum, Eschelon urges the Commission to reestablish all existing UNEs on the same terms and conditions as set out in the *UNE Remand Order*. In addition, the Commission should reconsider its switching carve-out for the most dense markets because the competitive alternative sources the Commission thought would emerge have not appeared, at least in Eschelon's markets. The so-called "market-based" prices that Qwest charges in its carved-out markets for unbundled switching and switching features are monopoly prices, not competitive wholesale prices. If there were a viable wholesale market for switching UNEs, CLECs like Eschelon would be able to purchase it at wholesale rates. That simply is not the case.

The Commission should also recognize the necessity of UNE-P or other platform products for companies like Eschelon that serve small business or residential customers. It is unrealistic to expect CLECs serving geographically dispersed customers to achieve economies in sales, marketing, and administrative costs if they can only serve customers reached by their own facilities.

In addressing the many issues involved in this proceeding, the Commission should further elaborate the role that state commissions need to play in defining the contours of the local competitive landscape. State commissions should be consulted and this Commission should request that states conduct detailed factual investigations into local conditions before any UNE is delisted or restricted. If a particular state commission is unable or unwilling to undertake such an effort, the Commission should conduct its own investigation.

The Commission is concerned to elicit respondents' opinions about the level of granularity unbundling analysis should have. As developed below, restricting or delisting any UNEs should only be done after a very granular analysis of the circumstances in the affected markets and the conditions of the affected carriers. There are great differences in the

geographies and population densities, in the extent to which the ILECs have opened their markets to competitors, and in the degree to which competitive carriers have established themselves in each state. It is appropriate for this Commission to set the principles that should guide unbundling analysis, but it is impractical for the Commission itself to undertake the granular analysis across the nation. It is more practical for the Commission to seek factual input from state authorities.

The Commission should bear in mind that the parties it hears the most from are the largest carriers that can afford a lobbying presence together with those carriers located near Washington, D.C. Eschelon is a small carrier operating in Western and Midwestern states. Eschelon interacts much more frequently with state commissions and their staffs than it does with the Commission and its staff. By giving a central role in unbundling decisions to state commissions, this Commission will help ensure that unbundling requirements are responsive to the needs of all members of the industry.

I. THE FRAMEWORK FOR UNBUNDLING ANALYSIS.

A. For Proprietary UNEs, the Commission Should Continue to Apply the “Necessary” Test as Set Out in the *UNE Remand Order*.

With respect to proprietary network elements, the *UNE Remand Order* looks to whether the requesting carrier would, “as a practical economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.”⁵ This standard protects intellectual property by precluding non-essential access. However, the Commission should not permit ILECs to use this protection to thwart competition. Before a CLEC is required to demonstrate that a purportedly “proprietary” element is necessary, the ILEC should bear the

⁵ *UNE Remand Order* at 44 (emphasis in original).

burden of proving the element really is proprietary. The ILEC should demonstrate that it has invested resources to develop the element, and that but for that investment, the ILEC would not itself have access to the element. ILECs should not be permitted to avoid unbundling obligations by merely reproducing existing non-proprietary elements within a proprietary shell.

B. For Non-Proprietary UNEs, the Commission Should Continue to Apply the “Materially Diminish” Standard for Impairment as Set Out in the *UNE Remand Order*.

Section 251(d)(2)(B) states that the Commission shall consider whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”⁶ In the *UNE Remand Order*, the Commission stated that a carrier would be impaired by lack of access to a UNE if such lack of access materially diminished that carrier’s ability to provide the services it seeks to offer.⁷ In particular, the Commission considered the factors of cost, timeliness, quality, ubiquity, and operational issues in making such an assessment. These factors are as valid now as when the Commission issued its order. Since each factor can independently materially diminish a carrier’s ability to provide a service, a priori, no more or less weight should be assigned to any particular factor. Instead, these factors should collectively be assessed in the totality of the particular circumstances of the requesting carrier.

In its *UNE Remand Order*, the Commission did not indicate that by “requesting carrier” it intended a certain kind of carrier.⁸ The Commission appropriately did not state that impairment was to be assessed relative to a long established carrier operating across the country or against a fledgling carrier offering service for the first time. In promoting competition, the Commission

⁶ 47 U.S.C. § 251(d)(2)(B).

⁷ *UNE Remand Order* at 51.

⁸ *Id.* at 55.

sought to open the market to a full range of competitors. Unbundling analysis should consider the services carriers seek to offer and it should assess the means available to them to provide those services apart from access to UNEs.

CLECs like Eschelon that emerged after the passage of the Telecom Act are at a vastly different stage of development than older companies that entered local exchange markets with already established organizations and with large network operations in place. Established companies tend to have internal sources of funding in addition to ready access to debt and equity markets. Large companies can exploit their presence in the marketplace, including their name and brand recognition; they can utilize their existing organizations to support new services; and they can incrementally add facilities that their volume purchases enable them to acquire at a discount. Large companies have access to economies of scale in advertising, sales, marketing, provisioning, network operations, customer care, repair, and billing. Small, young companies entering the local services market face relatively large fixed capital investments and they must build their customer base from nothing and then grow that base quickly. A lack of access to UNEs that might not impair a more mature and established company could certainly impair companies like Eschelon that are in their early phases of growth.

In addition to directing consideration to the “requesting carrier’s ability”, the impairment standard also directs attention to “the services [the requesting carrier] seeks to offer.”⁹ A carrier’s offerings are tailored to the markets or market segments the carrier seeks to serve, and accordingly, impairment also must be assessed with respect to the special characteristics of the market the requesting carrier is seeking to enter.¹⁰

⁹ *Id.* at 51.

¹⁰ *Id.* at 54.

Eschelon primarily serves small business customers in lesser density urban and suburban settings. On average, Eschelon provides its customers five access lines. For the most part, Eschelon's customers are geographically dispersed and located in small buildings, and not primarily concentrated in large downtown skyscrapers.¹¹ Eschelon collocates only in wire centers that serve sufficiently large numbers of small businesses to offer a reasonable prospect of gaining sufficient customers to pay back the investment after a number of years of developing a customer base.¹² The geographically dispersed customer base and the small number of access lines taken by each customer makes it economically unfeasible for Eschelon to build its own loops.¹³ Further, unlike ILECs and large CLECs and DLECs that serve business customers concentrated in compact areas, Eschelon's dispersed and small-scale customer base does not generate enough traffic in a wire center for Eschelon to economically justify building its own interoffice transport.¹⁴ Although Eschelon's business operations would be much less troublesome if it did not have to rely upon ILEC provisioning of parts of its network infrastructure, the nature of the market that Eschelon seeks to serve does not make it economically rational for Eschelon to construct its own independent network.

It is not realistic for a small company such as Eschelon serving small business customers to have a ubiquitous network. Yet, using UNEs in combination with its own facilities, Eschelon is able to serve customers in 'second' and 'third' tier markets that otherwise may not have the benefit of a choice for local service provider.

A telephone company is not just purchased and turned on to serve the hoards of consumers who have just been waiting for that moment. Telephone companies, their networks

¹¹ Affidavit of David Kunde at ¶ 5; Affidavit of Robert Pickens at ¶¶ 5-6.

¹² Affidavit of Robert Pickens at ¶ 7.

¹³ Affidavit of Paul Hanser at ¶¶ 4-7.

and their customer bases are built over time. Investment in network facilities is lumpy – CLECs put a switch in place and invest in collocations and then spend several years attracting customers to make use of those facilities. Capital and current costs start high and accumulate steadily and CLECs have to grow their customer base rapidly enough so that revenues will exceed costs before loans come due and investors lose their confidence. Removing or restricting the UNEs before a newly established CLEC has an opportunity to grow its revenues past the breakeven point, will materially impair its ability to serve its customers unless alternative suppliers of UNEs are available at reasonable costs, and on reasonable terms and conditions.

C. Unbundling Network Elements Encourages Investment in Telecommunications Facilities.

The Commission is highly interested in encouraging investment in facilities by new entrants. However, the Commission should be extremely wary of arguments based upon the “if they can’t buy it, they will build it” rationale for several reasons. First, because capital markets are closed to CLECs, efforts intended to prod CLECs to make greater investments have all the effect of pushing on a string. Until the investment climate for CLECs improves, the Commission will not see significant investment in facilities by CLECs no matter what the Commission does, or does not, do.

Second, CLECs already have many incentives to invest in facilities – they would do it if they could. Ownership and control of facilities provides CLECs with better control over the equipment and network that serves their customers. Providers who control their own facilities can establish and maintain their own installation schedules. They have the ability to set specific service guarantees to customers because they can more quickly and reliably repair outages and because they can design, build and maintain their network to meet their own standards. ILECs

¹⁴ Affidavit of Paul Hanser at ¶¶ 4-7.

do not give the same level of attention to maintaining facilities they provide to CLECs that CLECs themselves would provide.¹⁵

Third, the economics of telecommunications infrastructure simply does not permit CLECs like Eschelon to invest in duplicating much of the ILEC's network.¹⁶ One of the central insights of the Telecom Act was that society at large does not benefit from duplicative investment in telecom facilities. The Act does not require CLECs to build duplicative networks. Most CLECs construct their networks using a combination of UNEs together with their own facilities. State commissions have sought to price UNEs at the forward-looking costs of the ILECs plus a reasonable profit. Because Eschelon seeks to serve small business customers who are geographically dispersed and subscribe to small numbers of access lines, Eschelon could construct a complete network only at much greater cost than an ILEC.¹⁷ Because they do not seek to be ubiquitous providers, CLECs generally lack the economies of scale and scope in network construction that the ILECs have. Consequently, requiring CLECs to build complete networks imposes high costs upon them. The only beneficiaries of such duplication are the ILECs who can use their cost advantage to preserve their monopoly presence. From society's standpoint, duplication of infrastructure is a waste of resources.

In six of its markets, Eschelon has invested in switching facilities and collocations. Eschelon analyzed each market, and each central office in each market, to determine where there were sufficient small business customers to economically justify the investment.¹⁸ While Eschelon operates these facilities, it relied on outside contractors to do the installations.

¹⁵ Eschelon has undergone three (3) separate incidents in Arizona when Qwest-provided DS3 high capacity facilities have gone out of service during a six-week period. Restoral times were approximately 3, 6, and 6 hours, respectively. Qwest restoral times for their own facilities are typically significantly shorter.

¹⁶ See generally Affidavit of Paul Hanser.

¹⁷ *Id.*

Eschelon does not have a construction staff either for switching and collocations or for outside loop and transport plant. Eschelon leases loops entirely and transport principally from the ILECs. Eschelon could not economically construct loops to customer premises. Its customer premises are widely dispersed and its average customer is served by only four loops.¹⁹ Small businesses also have much higher mortality rates than big businesses and move more frequently.²⁰ With respect to interoffice transport, Eschelon's customer base simply does not generate the volume of traffic that would justify construction and ownership of such facilities.²¹

Without access to loops and transport, Eschelon would not be able to economically serve its customer base and Eschelon would not have invested in building the network facilities that it did build. Eschelon's investment in facilities grows every time Eschelon adds an "on-net" customer. The cost of the cut over and the additional line cards required at the collocation and at the switch are investments. Instead of discouraging facilities investment, the availability of UNEs actually encourages facilities investment by Eschelon.

Eschelon's facilities investment is also encouraged by its access to UNE combinations. As noted, Eschelon only collocates equipment in central offices with sufficient concentrations of small businesses to offer a reasonable prospect of earning a return from the investment. Eschelon terms the areas served by its collocations "on-net." Part of the calculations involved in determining how large Eschelon's "on-net" area is involve determining how Eschelon could serve customers located in "off-net" areas.²² A substantial portion of Eschelon's customers have multiple locations. Over a third of Eschelon's customers have both "on-net" and "off-net"

¹⁸ Affidavit of Robert Pickens at ¶ 7.

¹⁹ *Id.* at 5-6.

²⁰ *Id.* at 13.

²¹ Affidavit of Paul Hanser at ¶ 4.

²² Affidavit of Robert Pickens at ¶¶ 7, 11

locations. In many cases, these customers would not even consider Eschelon for being their service provider unless Eschelon could serve all their locations, both “on-net” and “off-net.” Access to UNE combinations gives Eschelon a means of serving “off-net” customer locations and that ability increases Eschelon’s ability to attract “on-net” customers.²³ Without a means for serving “off-net” customer locations, Eschelon’s “on-net” area, and thus its investment in facilities, would be smaller than it is today.

It will never be efficient for CLECs like Eschelon, which serve particular market segments, to ubiquitously deploy facilities. CLECs serving particular market segments will make facilities investments only where those customer densities are sufficiently high. Those requisite customer densities are lower where the CLEC has an “off-net” product offering and they are higher where the CLEC is not able to serve “off-net”.

If the FCC takes the approach that the use of UNEs by CLECs should be supplanted by complete facilities-based competition, the local telecommunications market will never have robust competition consisting of many sizes of providers targeting different markets. Nor will it have even the level of competition that has emerged in long distance where a few huge players dominate the field. In the local market, the ILEC will continue to be the only option for most consumers. The only CLECs that will survive will be those that serve geographically dense niche markets.

The FCC should not take such a course. It should make sure it adopts policies that permit small, specialized companies such as Eschelon to thrive. Eschelon’s 32,000 small business customers in some of the nation’s smaller metropolitan areas want an alternative to the ILEC. To ensure a diverse and robust emerging competitive market, facilities based CLECs such as

²³ Affidavit of Steven Wachter at ¶¶ 5-6.

Eschelon need access to UNEs and UNE combinations at cost based rates to permit them to provide choices to customers as envisioned by the 1996 Act.

The facilities that it makes sense for an entrant to invest in depends upon the kind of business the entrant is seeking to build. An approach to unbundling requirements based upon the assumption that competitive markets require complete network build-outs is an approach that defines competition in a very limited manner because only a few business models support that scale of investment. If an entrant chooses to widely deploy facilities, the entrant must be targeting a very broad range of customer classes. If an entrant deploys facilities narrowly, the targeted market consists of a dense agglomeration of customers.

The Telecom Act seeks to bring the benefits of competition to all consumers. That goal is frustrated rather than achieved by policies that effectively require new entrants to serve all consumers in a particular area. While certainly serving all customers in a particular area is one business model that can work, it should not be the exclusive model. Eschelon is a small carrier that provides small businesses with choices that are tailored to the particular needs of small business. Small businesses cannot afford to have their own telecommunications specialist on staff. Eschelon provides them with expert advice to assist them in selecting the most cost-effective telecommunications equipment and network services.²⁴ Companies such as Eschelon allow small business customers to reap the competitive benefits contemplated by the passage of the Act. An approach to unbundling that attempts to encourage entrants to build complete networks would harm Eschelon and the consumers it serves.

There is no “one size fits all” model for competition. Investment in complete network build-out is one approach to competitive entry which the Commission should encourage;

²⁴ Affidavit of Steven Wachter at ¶ 3.

however, the Commission should take care that its policies do not result in making full network build-out the only avenue for entry.

If the Commission seeks to promote investment in facilities by competitive carriers, it is premature for the Commission to remove any UNEs from the list. Each UNE is necessary for CLECs to provide meaningful competition to the ILECs. Small facilities based CLECs such as Eschelon continue to need ILECs' switching, loops and transport to serve their customers. Eschelon's switches and collocations enable it to provide service using its facilities to customers within its on-net footprint but it still requires ILEC loops, transport and tandem switching. Eschelon requires UNE combinations including ILEC local switching to provision services to customers outside its on-net footprint.

It is simply not feasible for the CLECs to duplicate the ILECs' networks that have been built with the funds of captive ratepayers for decades. Whereas when the Commission last considered the availability of UNEs from non-ILEC sources, CLECs were able to obtain funding for facility investments, that is no longer the case. In effect, the closing of capital markets to CLECs dictates that there will be only be very limited investment in facilities for some time. The closing of capital markets to CLECs makes the continued availability of unbundled network elements from the ILEC imperative for the survival of competition in local telecommunications.

D. Unbundling Has Encouraged Broadband Deployment.

In addition to seeking information about the relationship between unbundling analysis and investment in facilities, the NPRM similarly requests respondents to consider the relationship between unbundling analysis and broadband deployment.²⁵ Eschelon principally serves customers in urban and suburban markets in Qwest territory. Qwest broadband services

²⁵ NPRM at ¶ 22.

are widely available to consumers in these markets. In fact, Eschelon provides its own DSL and data services in its markets as well as reselling Qwest and Covad data services. Eliminating unbundling requirements in Eschelon's markets would do nothing to make broadband services more widely available. In Eschelon's markets, there is a positive association between the availability of UNEs and broadband. Eschelon can provide broadband services only because it has access to UNEs. Because competitors like Eschelon can provide broadband services with UNEs, ILECs are forced to provide broadband services in areas served by CLECs as well.²⁶

The Commission should focus its inquiry on areas that do not have access to broadband. In these areas, the Commission will find there is not significant use of UNEs. The question of how to craft unbundling policy to best promote the provisioning of broadband services over wireline networks could well be restated as how develop an unbundling policy that best encourages the availability of UNEs capable of providing broadband services. The Commission's actions in promoting and encouraging the use of UNEs have stimulated broadband deployment. Competition spurs investment and UNEs make competition possible.

If the Commission is persuaded by the unsupported claims of ILECs that their unbundling obligations are stymieing their investment in broadband facilities, and the Commission determines that eliminating or restricting unbundling obligations with regard to high capacity loops and transport is necessary, the Commission should only do so in those areas that have no access, via wireline or otherwise, to broadband services. Clearly, where access exists, reducing unbundling obligations is unnecessary. The Commission should also narrowly tailor the relief provided to achieve the end sought and put in place a timeline for ILEC

²⁶ Affidavit of Robert Pickens at ¶ 14.

deployment in the areas that lack access, backed by substantial penalties should the timeline not be met.

E. The Commission Should Not Set a Date for Eliminating Unbundling Obligations.

The Commission has requested comment on whether UNEs should sunset as of a specific date.²⁷ A UNE should be available to CLECs until such time as the Commission determines, based upon objective evidence, that the particular UNE is no longer necessary under the test developed by the Commission in the *UNE Remand Order*. To delist a UNE based upon time alone would be poor public policy for several reasons. First, it would reward the ILECs for anti-competitive behavior. ILECs would be further rewarded for their tactics of delay and for not properly or timely provisioning UNEs, not properly billing for UNEs, and not developing adequate OSS systems. The Commission will recall that during the negotiations leading up to the Telecom Act, there was discussion of having long distance restrictions sunset at a date certain. Fortunately, the section 271 checklist approach was enacted instead and any ILEC wanting to enter long distance must pass the FCC's review. Given how few ILECs have passed that review in the six years following enactment, it is clear that a sunset approach would have done little to open local markets to competitors. It is unreasonable to expect that ILECs would meet their unbundling obligations if the passage of time alone would relieve them of those obligations.

Second, having UNEs sunset at a specific date would also run afoul of the clear mandate of Section 251(c) and (d) of the Act. Congress has required the FCC to use objective criteria to determine which network elements should be made available to CLECs.²⁸ The Commission

²⁷ *NPRM* at ¶¶ 45 and 77.

²⁸ 47 U.S.C. § 251 (d)(2).

must, at a minimum, consider whether access to a proprietary element is necessary and whether a CLEC would be impaired in providing service without access to the element. Clearly, the mere passage of time cannot determine whether a CLEC will no longer be impaired by not making the element available. The Commission should continue to determine availability of UNEs based on the test it developed in the *UNE Remand Order* to ensure CLECs continue to have the tools necessary to compete.

Rather than adopting a sunset approach, the Commission should continue to rely on a fixed term review process and set the next review for 2005.²⁹ With a fixed term process, all affected parties have some degree of regulatory certainty. A major obstacle to CLEC efforts to raise capital is regulatory uncertainty. By maintaining the fixed term review process, the Commission will give Wall Street some confidence that the rules of the game will not change overnight. Such confidence will however evaporate quickly unless the Commission also bars parties from filing petitions to eliminate or reduce unbundling obligations between fixed review periods. In addition, in that fixed term review process, the Commission should place the burden of proof on any party seeking to remove or restrict a UNE.

F. If Unbundling Obligations Are Changed, UNEs Currently in Use Should Remain Available.

As will be explained further below, it would be bad public policy to restrict the availability of UNEs at this time. If, however, the Commission decides to eliminate some UNEs or further restrict the availability of UNE-P, it should take the following steps to mitigate the damage to competition that would flow from such a decision. The Commission should grandfather existing uses of UNEs. The circuits are in place and customers are being served.

Transitioning customers from UNEs risks service disruptions and imposes unnecessary costs on carriers. Further, the Commission should permit CLECs to order additional UNEs to serve these customers. Failing to do this will in many cases be equivalent to directing customers to return to taking service from the ILEC.

If the Commission declines to preserve existing UNEs, the Commission should provide CLECs with sufficient time to secure alternative facilities, should they be available, or to deploy their own facilities. “Sufficient” time includes not only the period during which facilities might be reasonably constructed. It also includes the time necessary to raise capital. The transition period should not commence until the FCC ascertains that CLECs will have a reasonable opportunity to raise capital to fund UNE replacement.

G. State Commissions Are Able to and Should Play an Important Role in Determining Unbundling Obligations.

The FCC should continue with the policy announced in its *UNE Remand Order*, of setting a national floor for UNE availability.³⁰ The FCC should also provide for ample time for the state commissions to review and potentially supplement the Commission’s unbundling requirements. States have specific knowledge of the conditions in each market and should be given an opportunity to bring their expertise to bear in supplementing unbundling requirements as appropriate for state conditions.

The Act gave the Commission the authority to establish rules to guide states in determining appropriate prices for UNEs, but it left to states the job of determining those prices. Eschelon urges the Commission take a similar approach to changing its unbundling rules.

²⁹ The high level review of the state of economic competition that Section 11 of the Act requires occur every other year in even numbered years, cannot substitute for the “necessary” and “impair” analysis required by the *UNE Remand Order*.

³⁰ *UNE Remand Order* at ¶ 153.

Having established the basic unbundling rules that laid the groundwork for competition to begin to develop, the Commission should be extremely wary of changing unbundling requirements without the concurrence of state authorities who are more intimately familiar with how such changes will affect conditions in their territories.

II. SPECIFIC NETWORK ELEMENTS.

A. Eschelon Would Be Impaired Without Access to UNE Loops and UNE High Capacity Loops.

UNE loops, including high-capacity loops, remain necessary for CLECs to compete in the local service market. Eschelon relies upon ILECs to provide DS0 voice grade loops and high-capacity loops of DS1 or above. Self-provisioning of loops is not viable for Eschelon because Eschelon's small business customers are geographically dispersed and use they use very small numbers of loops.³¹ Small businesses have higher mortality rates than large businesses and move more frequently.³² Given Eschelon's very small market share, it is unlikely that the subsequent occupant of a property served by an Eschelon loop will also take Eschelon service. If the ILEC provides service to the subsequent occupant, the ILEC will use its own facilities. If another CLEC provides service, that CLEC will also use ILEC facilities. Investment in loop plant for Eschelon is extremely risky because there is no opportunity for Eschelon to wholesale its plant.

As a practical matter, there are no wholesale providers of wireline loops other than ILECs in Eschelon's territory. It is difficult enough for a CLEC to compete with the ILEC in the retail market. CLECs cannot compete with ILECs in wholesaling facilities because CLECs do not have ubiquitous networks. CLECs would clearly be impaired if they could not access the loop.

³¹ Affidavit of Paul Hanser at ¶¶ 4-7.

³² Affidavit of Robert Pickens at ¶ 13.

CLECs continue to require access to unbundled high capacity loops, because self-provisioned and third party-provided high capacity loops are not available on a uniform, widespread, cost-effective, and timely basis.³³ Eschelon requires access to high capacity loops to serve certain of its small business customers. While Eschelon's average customer subscribes to four lines, Eschelon has significant numbers of customers that take sixteen or more lines. These larger small business customers are most efficiently served in many cases with a T-1 line. Ninety-four percent of Eschelon's T-1 lines are obtained from ILECs. The lack of access to capital markets has affected third party providers of loops just as it has affected CLECs.³⁴ Clearly, eliminating high capacity loops at this time would impair CLECs' ability to provide services.

The FCC requires the ILECs to provide Enhanced Extended Loops ("EELs") as a substitute for switching in the top 50 MSAs for customers subscribing to four or more lines.³⁵ Although Eschelon does use EELs to provide DS1 level service to customers, Eschelon does not regard EELs as appropriate for customers taking service at the DS0 level. The multiplexing involved for DS0 service introduces an additional point of failure into the network. Since Eschelon does not have access to the offices linked by the EEL, Eschelon would be entirely dependent upon the ILEC for testing, trouble isolation, and repair.³⁶ Instead of EELs, Eschelon uses a platform product from Qwest to serve DS0 customers that are located off Eschelon's network in order to avoid the testing and repair problems associated with EELs.

³³ Affidavit of David Kunde at ¶ 10.

³⁴ *Id.* at ¶¶ 5-6, 12.

³⁵ *UNE Remand Order* at ¶ 253.

³⁶ Affidavit of David Kunde at ¶ 15.

In addition to the technical difficulties of efficiently testing and repairing EELs, the Commission made EELs administratively difficult to use by placing local use restrictions on them in the *UNE Remand Order* and the Orders clarifying that Order.³⁷ In the Supplemental Order Clarification, the Commission instituted a temporary requirement that EEL lines contain a certain percentage of local voice traffic.³⁸ The Commission explained that it was trying to ensure that IXC's continued to pay ILEC's access charges for long distance calls. However, Qwest has interpreted the language as forbidding CLEC's to certify EEL lines that carry significant data traffic, not just long distance voice traffic. Qwest insists the Commission intended to prohibit data traffic even though no usage based access charges are charged for the data traffic. This restrictive interpretation by Qwest has made EELs less useful to Eschelon and its small business customers. The FCC should immediately either remove the temporary local use restriction or clarify that an EEL can be used to transmit data calls for which no usage based access charges apply.

The Commission has asked parties to comment on whether network elements should be subject to a "granular" analysis in this proceeding.³⁹ As noted above, there are obvious difficulties with having the Commission conduct nation wide granular analysis. With regard to achieving granularity via service restrictions, the Commission's attempts to do so thus far have not been successful. As noted above, the Commission's decision to limit the availability of EELs to lines with a "significant amount of local usage" was an attempt to protect ILEC access revenues. But, that restriction has resulted in at least one ILEC denying EELs that contain a

³⁷ *UNE Remand Order* at ¶ 480; *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd 1760 (1999); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000).

³⁸ Supplemental Order Clarification at ¶ 5.

³⁹ NPRM at ¶ 34.

significant amount of data traffic even though the traffic is not subject to usage based access charges. Putting service restrictions on UNEs will have unintended negative consequences to the development of local competition because ILECs will have every incentive to expand the restriction while CLECs will be oppositely inclined to restrict it. In these interpretive disputes, the ILEC's interpretation governs unless the CLEC chooses to litigate, which it frequently cannot afford to do.

Further, restricting UNEs to certain services would certainly stifle innovation and creativity on the part of CLECs. By restricting the type of service CLECs can provide with a given UNE, possible new applications that may benefit customers would be thwarted. This result would be contrary to the intent of the Act.

Subjecting UNEs to certain geographic restrictions also would not benefit the development of competition unless there is clear evidence that adequate alternative providers of the facilities are available. In its *UNE Remand Order*, the Commission found that a number of CLECs had installed switching facilities in major metropolitan areas.⁴⁰ The Commission concluded that because there were non-ILEC switches in these markets, the ILECs no longer had to provide local switching to CLECs serving all but the smallest customers. However, just because there were non-ILEC switches in these markets did not mean that these switches were available to other CLECs on a wholesale basis. The Commission's geographic restrictions have assisted the ILECs along with some CLECs with switches by reducing the ability of other CLECs without switches to serve these areas. The Commission would have reached a different conclusion if it had considered whether there actually were multiple providers of unbundled switching in these markets.

⁴⁰ *UNE Remand Order* at ¶ 254.

In general, CLECs lose the benefit of the ILECs' ubiquitous network when restrictions are put on where they can obtain elements to provide service to its customers. When there are good substitutes for using ILEC facilities, CLECs will use them. In assessing impairment, the Commission should consider whether significant numbers of CLECs are using alternative sources of the UNE, not whether there are a few CLECs that do not have to purchase the UNE. Limiting the availability of wholesale UNEs will tend to further industry consolidation and eliminate small niche competitors. Facilities based CLECs such as Eschelon that provide service to small businesses and rely on UNEs to reach their customer base will be in jeopardy if UNEs are only available in discrete areas.

B. Eschelon Would Be Impaired Without Access to Interoffice Transmission UNEs.

Eschelon purchases transport from Qwest to link its collocations to its switches and to link its switches to ILEC switches and to other carriers. As explained above, Eschelon does not have enough traffic to justify building its own transport facilities. Eschelon also consciously seeks to obtain transport from providers other than Qwest.⁴¹ As demonstrated by the events of September 11, 2001, reliable and robust telecommunications systems require diversity. Carriers should have more than one path to send messages to ensure continuous service to customers. If ILECs were no longer required to provide transport, the reliability of the network would be degraded because carriers would have less opportunity to obtain diverse routes for their calls. Because diverse routes are required for network reliability, it is not sufficient that there just be a single alternative to the ILEC for transport. To escape dependence on the ILEC, CLECs require multiple alternative providers of transport.

⁴¹ Affidavit of David Kunde, at ¶ 10.

The FCC should continue to require ILECs to provide both dedicated and shared transport to CLECs. Adequate alternatives do not exist. The mere market presence of alternative providers in certain discrete locations does not necessarily mean that providers have sufficient capacity to provide to other CLECs.⁴² Nor do these carriers have an obligation to meet CLEC demand. There are substantial costs involved in coordinating multiple vendors. The more transport vendors a CLEC has, the greater the number of contracts that must be negotiated and monitored and different ordering processes must be mastered, each with its own requirements. If problems arise, having multiple vendors means there are different points of contact and different repair procedures to keep track of. Each vendor renders its own bill and each bill must be validated. Billing disputes are not uncommon and having multiple vendors makes this process more difficult as well. Eschelon attempts to attain volume discounts by concentrating purchases and this too makes multiple providers less desirable.

Although ILECs have suggested that alternatives to ILEC facilities are available wherever there is demand, this is not true. Eschelon has had to order two different paths from Qwest in situations in which dedicated transport was not available from any other carriers. Carrier diversity is just beginning to develop and is not available in all areas.⁴³ Eliminating transport as a UNE would threaten availability of carrier diversity even in those limited areas where it is currently available. Network reliability and integrity depends on diversity and that diversity cannot be maintained without the transport UNE.

⁴² *Id.*

⁴³ *Id.*

CLECs like Eschelon would be impaired without being able to purchase transport UNEs. Limiting transport UNEs for certain services, for example, for voice rather than data, would be extremely problematic. Eschelon's small business customers have voice and data needs that are generally provided over the same facilities. This voice and data traffic cannot be readily separated for transport along separate facilities.⁴⁴ Geographic limitations are also problematic. As noted above, Eschelon seeks transport diversity, but it seeks to obtain diversity from the same providers in all its markets. For the reasons discussed, transport available to Eschelon in Minneapolis from carrier X would not be purchased by Eschelon unless carrier X also provided transport in Eschelon's other markets because of the many inefficiencies involved in dealing with multiple transport vendors. CLECs need transport that is available to them on a uniform, widespread, cost-effective and timely basis in order to compete effectively. Limiting transport UNEs by transmission capacity is also problematic. Small CLECs like Eschelon frequently do not have the traffic volumes to justify owning high capacity transmission facilities.

Network integrity will suffer if the Commission makes transport unavailable based on the distinctions of service, geography or capacity. Diversity is imperative to assure a robust network and the ILECs transport is needed to provide diversity.

C. Eschelon Would Be Impaired if UNE Combinations Including Local Switching Were Not Available.

Access to ILEC switching remains necessary for CLECs to have the opportunity to compete in the local service market. Eschelon can provide switching itself in wire centers in which Eschelon has collocated facilities and to customers taking DS1 service served by an EEL. Because Eschelon targets small business customers, it can only cost justify collocations in wire centers with relatively high numbers of small businesses. Although it is possible that Eschelon

⁴⁴ *Id.* at ¶ 14.

could acquire enough customers in an “off-net” area to justify a new collocation, the fact is that in many wire centers, Eschelon will never have enough small business customers to invest in additional collocations. Eschelon must provide “off-net” services to efficiently use its own network and its organizational resources. Eschelon cannot serve “off-net” customers with DS0 service in a timely and efficient manner and with high levels of service quality without using ILEC loops, transport, and switching. There is no adequate alternative to UNE combinations if Eschelon is to reach the small business customers it now serves in its “off-net” territory.

Discussions of UNE combinations or UNE-P frequently overlook the place UNE-P has in the spectrum of a CLEC’s service offerings as well as the indirect effects UNE-P can have on a CLEC’s overall operational efficiency. These are important considerations that should not be overlooked. Eschelon is able to serve many of its multi-location “on-net” customers because it has an “off-net” product to provide them.⁴⁵ Without providing “off-net” service, Eschelon could lose many of its “on-net” customers. Eschelon must provide “off-net” services to efficiently use its own network and its organizational resources. Being able to provide services “off-net” as well as “on-net” permits Eschelon to realize economies of scale in its advertising and sales efforts.⁴⁶ Most forms of advertisements are not wire center specific. Although sales people can target wire centers, approximately twenty five percent of Eschelon’s customers have off-net locations and sales productivity would suffer if these sales opportunities had to be forgone.⁴⁷ Higher customer volumes permit economies of scale to be realized through automating billing and customer service systems.⁴⁸

⁴⁵ Affidavit of Steven Wachter at ¶¶ 5-7.

⁴⁶ Affidavit of Robert Pickens at ¶¶ 10-12.

⁴⁷ Affidavit of Steven Wachter at ¶ 5.

⁴⁸ Affidavit of Arlin Goldberg at ¶¶ 2-4.

In the *UNE Remand Order*, the Commission determined that because many competitive switches had been deployed in density zone 1 of each of the top 50 MSAs, requesting carriers would not be impaired if incumbents were relieved of their obligations to provide unbundled switching.⁴⁹ Incumbents in these areas were required to provide EELs in these areas as well as unbundled switching for customers taking three or fewer lines. The Commission reasoned that because there were multiple non-incumbent switches that competitors without switches could use the switches of non-incumbents.⁵⁰ In the markets Eschelon serves, there are fourteen Qwest central offices in density zone one of the top 50 MSAs. Eschelon cannot buy unbundled switching in these central office areas from anyone other than Qwest.⁵¹ The Commission's assumption that competitors would provide unbundled switching was wrong. Competitors are not providing unbundled switching, and likely they are not doing so for reasons of inadequate demand and because CLECs using such switching would generally have higher transport costs in delivering traffic to the alternative switch than they have delivering it to the ILEC switch.⁵²

If Eschelon were to be asked to provide unbundled switching by another carrier, we would not provide it. There are several reasons for this. First, offering unbundled switching on a commercial basis would require Eschelon to develop a separate business unit. It would require a substantial volume of business to justify this expense and adequate volume does not exist. Eschelon would have to spend large sums of money to adequately conduct this business in terms of taking orders, providing the service, billing for it, and providing support.⁵³ For example, Eschelon receives access records for billing IXCs for long distance calls from Qwest.

⁴⁹ *UNE Remand Order* at ¶ 285.

⁵⁰ *Id.* at ¶ 278.

⁵¹ Affidavit of Paul Hanser at ¶ 3.

⁵² *Id.* at ¶¶ 3-5.

⁵³ *Id.*

Eschelon's own switch does not provide these records. Eschelon would have to develop a software program to identify access records associated with the unbundled switch and provide those records to the buyer of Eschelon switching.⁵⁴ Second, it would not be economical for any CLEC to buy switching from Eschelon. CLECs who need unbundled switching also need loops. Eschelon buys unbundled loops from Qwest and does not own its own loop plant. A CLEC would have to buy a loop from Qwest and then pay for transport to the Eschelon switch. It would be more efficient and cheaper for the CLEC to buy the loop and switching from Qwest. The ILEC's ubiquitous network makes it the low cost provider of UNE combinations.

The Commission should restore the ILECs' obligation to provide UNE combinations including unbundled switching. If the Commission is not willing to do that for all competitors because it believes doing so would not encourage investment in facilities, it should make UNE combinations available to carriers like Eschelon which use UNE combinations in conjunction with their own facilities based offerings to serve particular markets. Further restricting UNE combinations would do nothing to promote competition and in fact would undermine many competitors and their customers. The Commission should certainly not further restrict the availability of UNE combinations.

The Commission can gauge the extent to which competitive market forces are setting prices by comparing the prices ILECs term "market prices" with the forward looking costs of those facilities. In a competitive market, prices should stay close to cost.⁵⁵ Qwest has proposed "market prices" for local switching, switch features, switch ports, and AIN features in its Statement of Generally Available Terms and Conditions ("SGAT") that the Company has filed

⁵⁴ *Id.*

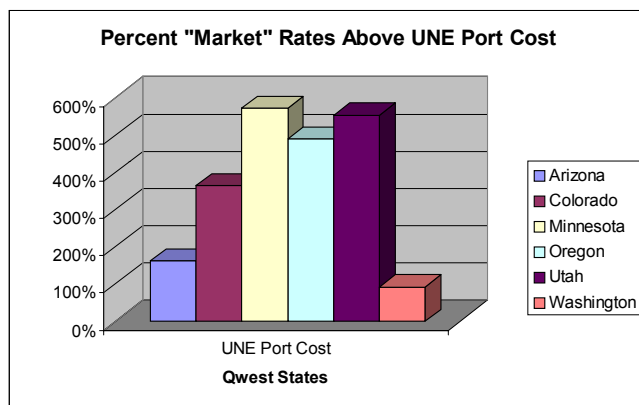
⁵⁵ Affidavit of Garth Morrisette at ¶ 9.

with state commissions. Qwest proposes to charge these prices in areas where it is not currently required to provide UNE-P.

Table 1 below compares Qwest's UNE port costs as determined by the state commissions to Qwest's own "market based" rates for the states where Eschelon provides service. State commissions have set monthly recurring rates for unbundled access to Qwest's switch ports at prices varying from \$.90 on the low end to \$1.61 on the high end. The state commission sought to set rates at Qwest's forward looking costs plus a reasonable profit. By contrast, Qwest's proposed UNE switch port rates are much higher and range from \$2.58 to \$7.26. Market forces are surely not disciplining Qwest pricing when Qwest is setting its rates at two, three, four, five and almost six times its costs. Either Qwest set its port rates to deter competitors from purchasing them, or Qwest is taking advantage of the fact that it faces no competition in the wholesale market.

TABLE 1: COMPARISON OF SWITCH PORT COSTS TO "MARKET" PRICES⁵⁶

	Arizona	Colorado	Minnesota	Oregon	Utah	Washington
UNE Port Cost	\$ 1.61	\$ 1.15	\$ 1.08	\$ 1.14	\$ 0.90	\$ 1.34
Market Based Port Cost	\$ 4.21	\$ 5.33	\$ 7.26	\$ 6.71	\$ 5.88	\$ 2.58
% Market Above UNE Cost	161%	363%	572%	489%	553%	93%

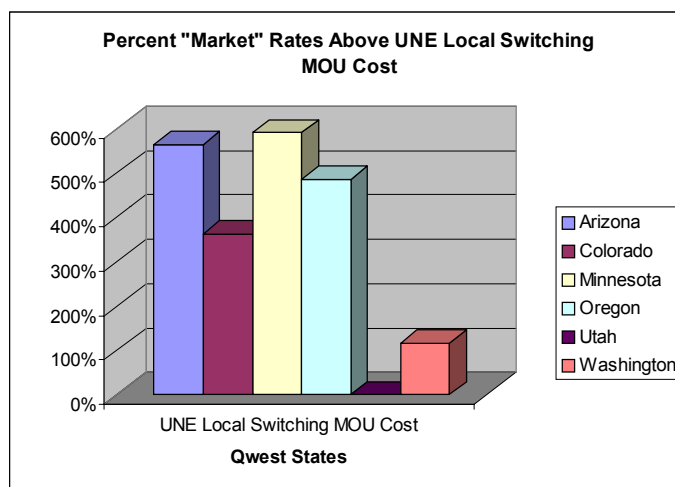


⁵⁶ Affidavit of Garth Morrisette at ¶ 6.

Table 2 presents a similar comparison of Qwest's unbundled local switching minutes of use rates as determined by state commissions with Qwest's proposed "market" rates.⁵⁷ In Washington, Qwest's proposed rate is "only" somewhat more than double what the commission determined Qwest's costs plus a reasonable profit to be. In Minnesota, Qwest's proposed rate is almost six times greater than the Commission determined rate.⁵⁸ Qwest's proposed rate in Arizona is seven times higher than the rate it proposes in Washington. Qwest's "market based" rates for local switching minutes are not competitive wholesale rates.

TABLE 2: COMPARISON OF LOCAL SWITCHING MOU COSTS TO "MARKET" PRICES

	Arizona	Colorado	Minnesota	Oregon	Utah	Washington
UNE Local Switching MOU Cost	\$0.0028	\$0.00283	\$0.0018	\$0.0013	\$0.0023	\$0.0012
"Market" UNE Switching MOU	\$0.0186	\$0.0131	\$0.0125	\$0.0078	*	\$0.0026
% "Market" Above Cost	564%	363%	591%	486%	*	117%



* Utah rates under development

⁵⁷ *Id.* at ¶ 7.

⁵⁸ *Id.* at ¶ 7.

Turning to the unbundled switch feature prices, the pattern of noncompetitive pricing continues. Qwest proposes establishing a la carte feature prices for a list of vertical features in Arizona, Minnesota, and Washington.⁵⁹ These states determined that all vertical switching feature costs were included in the unbundled switch port charge. CLECs do not have to pay any additional feature costs in Arizona, Minnesota and Washington. In Colorado, Oregon, and Utah, state commissions set prices for UNE vertical features and CLECs must pay these rates in addition to the port cost. Table 3 compares Qwest's proposed "market" prices for the unbundled vertical features that Eschelon would buy to the UNE prices for those features. Qwest's proposed "market" prices for these features exceeded the unbundled UNE feature cost by 67 percent in the Oregon at the low end and by an astounding 2753 percent in Arizona at the high end.

TABLE 3: COMPARISON OF UBS FEATURE COSTS TO "MARKET" PRICES

	Arizona	Colorado	Minnesota	Oregon	Utah	Washington
Port Plus Feature Cost	\$1.61	\$3.22*	\$1.08	\$4.14*	\$2.86*	\$1.34
Avg "Market" \$ Feature Per Line**	\$44.32	\$3.14	\$7.76	\$2.78	\$2.15	\$8.19
% "Market" Above Cost	2753%	98%	719%	67%	75%	611%

* Calculated based on Eschelon feature counts in exempt wire centers.

** Line counts based on Eschelon lines served in exempt wire centers.

⁵⁹ *Id.* at ¶ 8.

As these tables show, Qwest's "market" prices are far above its costs. The magnitude of the disparities presented above clearly indicates there is not sufficient competitive pressure to discipline Qwest's pricing practices. The state of competition in Qwest markets is not sufficient to warrant releasing Qwest from the requirement to provide cost based UNE-P.

D. AIN Features Are Not Necessarily Proprietary and CLECs Are Impaired by Qwest's Refusal to Unbundle Non-Proprietary Switching Features.

The Commission determined in its *UNE Remand Order* that certain software in the AIN platform was proprietary. Paragraph 402 of the *UNE Remand Order* states in part:

We . . . conclude, however, that service software created in the AIN platform and architecture is proprietary and thus analyzed under the 'necessary' standard of section 251(d)(2)(A). Based on our 'necessary' standard, we conclude that incumbent LECs are not required to unbundle the services created in the AIN platform and architecture that qualify for proprietary treatment.

Paragraph 419 then continued with the Commission's analysis of a particular AIN feature "Privacy Manager" and stated:

We agree with Ameritech that unbundling AIN service software such as 'Privacy Manager' is not 'necessary' within the meaning of the standard in section 251(d)(2)(A). In particular, a requesting carrier does not need to use an incumbent LEC's AIN service software to design, test, and implement a similar service of its own. Because we are unbundling the incumbent LECs' AIN databases, SCE, SMS, and STPs, requesting carriers that provision their own switches or purchase unbundled switching from the incumbent will be able to use these databases to create their own AIN software solutions to provide services similar to Ameritech's 'Privacy Manager.' They therefore would not be precluded from providing service without access to it. Thus, we agree with Ameritech and BellSouth that AIN service software should not be unbundled.

The Commission's order appropriately protected incumbents' investment in developing proprietary functionality. Ameritech developed "Privacy Manager" and has a proprietary interest in it that the Commission reasonably protected by imposing a higher standard for determining whether it should be unbundled. The Commission however, did not give all services created in

the AIN platform and architecture blanket proprietary status simply by virtue of being provided via an AIN platform, although that is how Qwest has interpreted the order.

Features such as Remote Access Forwarding, Scheduled Forwarding, Dial Lock, and Do Not Disturb are not proprietary to Qwest. Qwest justifies its decision not to unbundle these features on the basis that they are AIN features to which unbundling obligations do not apply. Remote Access Forwarding, which allows customers to forward calls from remote locations, for example, is functionality that is available in the switch port. Qwest has moved this functionality from the switch port to its AIN platform. Qwest has misinterpreted the Commission's order to evade its unbundling obligations with regard to this feature. Qwest should not be permitted to make a non-proprietary feature proprietary simply by providing it from an AIN platform.⁶⁰

Remote Access Forwarding, Scheduled Forwarding, Dial Lock and Do Not Disturb are all features that are important to significant numbers of Eschelon's small business customers. Eschelon was able to negotiate an amendment with Qwest to obtain these features with a platform UNE product, but only by paying prices that are much higher than Qwest UNE-P prices and carriers using Qwest UNE-P cannot obtain them at all. While CLECs can provide these features when they serve customers via their own switches, they cannot provide them otherwise.

E. The Commission Should Not Permit ILECs to Unbundle SS7 Charges.

Although Eschelon urges the Commission not to eliminate unbundling requirements, there is one instance in which Eschelon believes unbundling should not be permitted. This is with respect to signaling system seven ("SS7") services that Qwest has recently begun charging to other carriers.

⁶⁰ Affidavit of David Kunde at ¶ 17.

When Eschelon and Qwest customers call each other, the SS7 systems of both companies must communicate to set up the calls and to disconnect them efficiently. Calls completion requires that carriers have their SS7 systems “talk” to each other. Qwest has filed federal and state tariffs to allow it to charge Eschelon, and other carriers, for SS7 services. Eschelon obtains its SS7 services from Illuminet. Qwest does not pay either Illuminet or Eschelon for SS7 services provided to it. Qwest benefits from the SS7 services that Eschelon pays Illuminet to provide every bit as much as Eschelon benefits from the SS7 services.⁶¹ In this instance the unbundling of SS7 shifts the charges from IXC's to CLEC's since many CLEC's use SS7 providers like Illuminet to provide their SS7 services, those costs are imposed on the SS7 providers and passed on to the CLEC's. Since their SS7 providers are not regulated telephone companies, they have no authority to charge reciprocal SS7 charges to Qwest. Thus, the unbundling is used as a way to impose SS7 costs on CLEC's while avoiding the reciprocal SS7 costs incurred by CLEC's.

CONCLUSION

Eschelon respectfully requests that the Commission conclude this proceeding in accordance with its recommendations above.

Dated: April 5, 2002

Respectfully submitted,

ESCHELON TELECOM, INC.

/s/ J. Jeffery Oxley
By: J. Jeffery Oxley
Vice President and General Counsel

⁶¹ Direct Testimony of David A. Kunde and Direct Testimony of Paul Florak, Arizona Corporation Commission, Docket No. T-01051B-0391, December 19, 2001.